United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

TRANSCRIPT OF RECORD.

Court of Appeals, District of Columbia

OCTOBER TERM, 1907.

No. 1810.

505

MRS. L. D. SECHRIST, APPELLANT,

vs.

JOSEPH R. ATKINSON.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED JULY 20, 1907.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1907.

No. 1810.

LAURA D. SECHRIST, APPELLANT,

vs.

JOSEPH R. ATKINSON.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 4, 1907.

In the Court of Appeals of the District of Columbia.

No. 1810.

MRS. L. D. SECHRIST, Appellant,
vs.
JOSEPH R. ATKINSON.

a Supreme Court of the District of Columbia.

No. 48387. At Law.

JOSEPH R. ATKINSON, Plaintiff,
vs.
MRS. L. D. SECHRIST, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:—

1 *Certificate of J. P. on Appeal.*

Filed March 9, 1906.

In Justice's Court of the District of Columbia, Sub-District No. 6.
48387. No. 6722.

JOSEPH R. ATKINSON, Plaintiff,
vs.
MRS. L. D. SECHRIST, Defendant.

$240.00 Debt.

Date.	Proceedings.	
February 8, 1906.	Deposit to Costs.....	$1.60
February 8, 1906.	Bill of Particulars filed.	
February 8, 1906.	Summons and Copy Issued; Returnable February 14, 1906 at 2 P. M.....	.35
February 9, 1906.	Summons Returned Summoned as Directed.....	.50
February 14, 1906.	Issue joined and trial.....	1.00
February 14, 1906.	Judgment for Defendant.....	.25
February 14, 1906.	Appeal noted by Plaintiff.	
February 19, 1906.	Notice of Appeal filed.	
February 23, 1906.	Appeal Bond filed.	
February 23, 1906.	Appeal Bond approved with Samuel W. Pickford as surety.....	1.00
February 23, 1906.		

I, Robert H. Terrell, Justice of the Peace in and for the
2 said Sub-District, do hereby certify that the foregoing is a true copy of my Docket entries and of all the proceedings had before me in the above cause, and that the annexed documents are all the original papers filed in said cause.

Given under my hand and seal this 23 day of February, A. D. 1906.

ROBERT H. TERRELL, [SEAL.]
Justice of the Peace.

Costs paid by plaintiff, $3.10.
Costs paid by defendant, $——.

Memorandum.

May 13, 1907.—Verdict for plaintiff for $240.

Supreme Court of the District of Columbia.

TUESDAY, *May* 21*st*, 1907.

Session resumed pursuant to adjournment, Hon. Thos. H. Anderson, Justice, presiding.

* * * * * * *

No. 48387. At Law.

JOSEPH R. ATKINSON, Plaintiff,
vs.
MRS. L. D. SECHRIST, Defendant.

It appearing that under the Rule of Court, judgment on verdict should be entered herein, it is so ordered: thereupon, it is
3 considered and adjudged that the plaintiff herein recover of defendant herein the sum of Two Hundred and Forty Dollars, with interest from this date, together with the costs of suit to be taxed by the Clerk and have execution thereof.

Order for Appeal.

Filed May 27, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 48387.

JOSEPH R. ATKINSON
vs.
L. D. SECHRIST.

The Clerk of said Court will please note an appeal from the judgment in the above entitled cause and cause citation thereof to be issued to Joseph R. Atkinson the plaintiff.

WM. W. BOARMAN,
HAYDEN JOHNSON,
Attorneys for Defendant.

4 Filed May 27, 1907. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

At Law. No. 48387.

JOSEPH R. ATKINSON
vs.
MRS. L. D. SECHRIST.

The President of the United States to Joseph R. Atkinson, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein, under and as directed by the Rules of said Court, pursuant to an Appeal filed in the Supreme Court of the District of Columbia, on the 27″ day of May, 1907, wherein Mrs. L. D. Sechrist is Appellant, and you are Appellee, to show cause, if any there be, why the Judgment rendered against the said Appellant should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Harry M. Clabaugh, Chief Justice of the Supreme Court of the District of Columbia, this 27″ day of May, in the year of our Lord one thousand nine hundred and seven.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk,*
By ALF. G. BUHRMAN,
Ass't Cl'k.

Service of the above Citation accepted this — day of ——, 190–.

[Endorsed:] No. 48387, Law. Atkinson *vs.* Sechrist. Citation. Issued May 27, 1907. Service accepted May 27th, 1907. Enter my appearance for Plaintiff. James B. Archer, Jr., Attorney for Pl'ff. Filed May 27, 1907. J. R. Young, Clerk.

5 *Memorandum.*

June 7, 1907.—Appeal bond filed.

Supreme Court of the District of Columbia.

MONDAY, *June* 17*th,* 1907.

Session resumed pursuant to adjournment, Hon. Thos. H. Anderson, Justice presiding.

* * * * * * *

By Judge Barnard.

No. 48387. At Law.

JOSEPH R. ATKINSON, Plaintiff,
vs.
LAURA D. SECHRIST, Defendant.

Comes now the defendant herein by her attorneys of record and submits to the Court for its consideration, the Bill of Exceptions taken at the trial of this cause, and prays that the same be signed *nunc pro tunc,* and made of record, which is hereby so done and ordered.

6 *Bill of Exceptions.*

Filed June 17, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 48387.

JOSEPH R. ATKINSON, Plaintiff,
vs.
LAURA D. SECHRIST, Defendant.

Be it remembered, that the above entitled cause came on for trial on the 13th day of May, 1907, before Mr. Justice Barnard and a jury. Mr. James B. Archer, Jr., appeared for the plaintiff, and Mr. William W. Boarman and Mr. Hayden Johnson appeared for the defendant.

Whereupon, the plaintiff in order to maintain the issue on his part joined took the stand in his own behalf and testified that he was a real estate broker doing business in the City of Washington, District of Columbia; that in answer to a letter received from the defendant, he called at her house, No. 1227 11th Street, N. W., on the 31st day of August, 1905; that the defendant informed him that she wished to sell the house in which she lived and would accept for the same the sum of Six Thousand Dollars ($6,000.00) and authorized the plaintiff as a real estate broker to sell the said house for that amount; that the plaintiff then and there made the pencil memorandum on the back of letter hereinafter mentioned, which memorandum over the objection and exception of the defendant's counsel was read to the jury and is as follows: "1227
7 11 St. N. W.—10 R— b—, 2 story & basement, Lot X, Frame Stable, Rent $45, Price $7000, Stoves 4, Trust $4000 5%, Mrs. Lennan North, Mr. Bache South." That he thereafter wrote to Arthur J. Bache, who lived next door to the defendant, and offered him said house for sale. That the said Arthur J. Bache made the witness an offer of Seven Thousand Dollars ($7,000.00)

with a deposit of Fifty Dollars ($50.00). That the said Bache also signed the following contract which witness accepted subject to the approval of the defendant:

(*Contract.*)

SEPTEMBER 12, 1905.

Received of Arthur J. Bache a deposit of Fifty Dollars to be applied to part payment in the purchase of all lot 15, Fifteen, in Square 340, Numbered 1227 11th Street, N. W., in the city of Washington, D. C.

The purchaser is required, and Agrees, to make full settlement in accordance with the terms of sale within 30 days from this date, or the deposit will be forfeited.

Price of Property, Seven Thousand Dollars.

Terms of Sale, All Cash.

Title to be a good one or deposit refunded. All interest, taxes, insurance, rents, water-rents, and Special assessments (if any) to be paid to date of transfer. The purchaser is to bear the costs of examination of the title and conveyancing.

ARTHUR J. BACHE, *Purchaser.*
JOSEPH R. ATKINSON, *Agent.*

Accepted, ratified and approved.
—— ——, *Owner.*

8 That witness called upon the defendant and submitted to her this offer he had received from Bache, which offer she refused to accept, saying that if he got an offer of $7,000 so easy, he could get more. That on the 12th day of September, 1905, he informed her he had an offer of $7,500 and later on the same day wrote her to the same effect and in response he received from the defendant the following letter, having on the day before communicated to her verbally and by letter the above mentioned offer of $7,500.00:—

(*Letter.*)

SEPTEMBER 13, 1905.

Mr. Atkinson.

DEAR SIR: I received your letter yesterday and would like to see you. I called yesterday afternoon but you were not in.

I have been offered $7,800 spot cash, but I want $8000, and I think I can get it from the same party.

You can call and see me if you think it necessary.

Thanking you very kindly for your trouble.

MRS. L. D. SECHRIST.

P. S.—I wish to buy another home.

That witness endeavored to get the said Bache to offer $8000.00 for said property, but was unable to get him to offer more
9 than $7,500.00, which the defendant refused to accept, and she then told him he would have to get $8,000.00 net and

when he so informed Mr. Bache, the latter demanded his deposit of $50.00 and witness gave it to him. That the defendant subsequently sold the said property to the said Bache for the sum of Eight Thousand Dollars ($8,000.00) and conveyed it to him. That the usual commission on sales is three per cent.

Whereupon the plaintiff rested.

And the defendant, to maintain the issues upon her part joined, took the stand in her own behalf and testified as follows: That she wrote to the plaintiff the following letter:

(*Letter.*)

AUGUST 30, 1905.

Joseph R. Atkinson.

DEAR SIR: Please call as soon as possible to see me regarding some property I have to sell.

Hoping to receive a reply from you soon.

Very resp't., MRS. L. D. SECHRIST,
1227 11*th Street N. W., City.*

That in response to said letter the plaintiff called upon her on the 31st day of August, 1905. That she informed him that the
10 said property was for sale and asked him to receive offers therefor and submit the same to her; that she fixed no price upon the property but informed the plaintiff that she would consider offers for the same and let him know later what she would sell the same for. That later the plaintiff submitted to her an offer of $7,000.00, which amount she declined to accept. That on September 13th, 1905, she wrote a letter to the plaintiff which was offered in evidence and read as follows:

(*Letter.*)

SEPTEMBER 13, 1905.

Mr. Atkinson.

DEAR SIR: I received your letter yesterday and would like to see you. I called yesterday afternoon but you were not in.

I have been offered $7,800 spot cash, but I want $8,000, and I think I can get it from the same party.

You can call to see me if you think it necessary.

Thanking you very kindly for your trouble.

MRS. L. D. SECHRIST.

P. S.—I wish to buy another home.

That she declined to accept less than $8,000.00 for said property. That she had known Mr. Bache for a period of fourteen
11 years, for which length of time she had lived next door to him. That about a year prior to this negotiation she had talked with Mr. Bache about selling the property and its value. That subsequently the plaintiff informed her that the party who had offered $7,000.00 for the property, but whose name he declined to disclose, has raised his offer to $7,500.00, which amount witness also

refused to accept, insisting upon a sale for not less than $8,000.00. That the plaintiff informed her that he could not get more than $7,500.00 for the property. That later she put the property in the hands of her attorney, Mr. William W. Boarman, who sold the same to Mr. Bache for $8,000.00. And the property was subsequently conveyed to Mr. Bache.

And the defendant further to maintain the issues on her part joined, called as a witness ARTHUR J. BACHE, the purchaser of said property, who testified that he had known the defendant and lived next door to her on Eleventh Street for a period of fourteen years; that about a year prior to September, 1905, she told witness she would like to sell her property some day and he asked her what she thought it was worth and she said $10,000.00, to which he made no answer. That he demanded the return of his deposit of $50.00 on account of his $7,000.00 offer when told by plaintiff that he could not get the defendant to accept less than $8,000.00, which amount the witness testified he refused to pay. That later the witness heard that Mr. William W. Boarman had the property in charge and called upon him, and after some negotiations, agreed to pay therefor the sum of $8,000.00, which amount was accepted and paid and the property conveyed to the witness; that an offer of
12 $7,800.00 made prior thereto by Mr. Hodgkins to Mr. Boarman was witness' offer, and was made before the return of the deposit, but Mr. Boarman did not know Hodgkins represented Bache, and was not told so at the time.

And the defendant further to maintain the issues on her part joined, offered as a witness WILLIAM W. BOARMAN who testified that he had been the attorney for some time for the defendant; that during the early part of October the defendant placed the property in question in his hands for the purpose of selling. That a few days later Mr. Bache called upon witness, having heard that he had the property for sale, and after negotiations extending over a period of two weeks or more, sold said property to the said Bache for the sum of $8,000.00. That witness did not know until just before suit was filed in this case, that there had been any previous negotiations between the said Bache and the plaintiff respecting said property, or that said Bache had ever made an offer of any character to the plaintiff therefor; that witness received no commission and charged none; that an offer of $7,800.00 had been made witness by a Mr. Hodgkins, being the offer referred to in Mr. Bache's testimony; that between said offer of $7,800.00 and the subsequent offer of $8,000.00 plaintiff called on witness and told him of the offer of $7,500.00 without disclosing the name of the prospective purchaser and asked if Mrs. Sechrist would not take it, but witness told him he, witness, already had an offer of $7,800.00, referring to the offer of Mr. Hodgkins. Witness did not know Hodgkins was representing Bache.

That the presiding Justice thereupon proceeded to charge
13 the jury, and charged them if they believed from the testimony that the defendant had authorized the plaintiff to sell said property for the sum of $6,000.00 and the plaintiff had secured a purchaser in the person of Mr. Bache who had agreed and was able and willing to pay $7,500.00 therefor, the plaintiff had earned his commission upon $7,500.00 and would be entitled to recover on that amount, and further that if the jury believed from the evidence that the defendant had simply authorized the plaintiff to secure a purchaser for said property without fixing any price thereon and the plaintiff had secured a purchaser for said property at a price which she accepted and sold for, that defendant had performed his contract and earned his commissions and that the plaintiff had secured a purchaser in the person of Mr. Bache to whom the property was subsequently conveyed. And the Court further charged the jury that according to the defendant's contention, the plaintiff would not be entitled to a verdict unless he had found a purchaser willing to pay $8,000.00 net, for said property; and further that the burden of proof upon the issue in the case was on the plaintiff.

That counsel for the defendant excepted to that portion of the Court's Charge instructing the jury that "if they believed from the evidence that the defendant had simply authorized the plaintiff to secure a purchaser for said property without fixing any price thereon and the plaintiff had secured a purchaser for said property at a price which she accepted and sold for that the defendant had performed his contract and earned his commissions, and that the plain-
14 tiff had secured a purchaser in the person of Mr. Bache to whom the property was subsequently conveyed," for the reason that there was no testimony either on behalf of the plaintiff or the defendant upon which to found such a contract, and therefore so much of said charge was misleading and erroneous. And counsel for the defendant further excepted to so much of said charge as instructed the jury that "according to the defendant's contention the plaintiff would not be entitled to a verdict unless he had found a purchaser willing to pay $8,000.00 net, for said property;" for the reason that — was no evidence in the case showing that the defendant ever insisted upon receiving $8,000.00 net for said property, her agreement being to sell said property for $8,000.00. That all the foregoing proceedings were had and all the exceptions hereinbefore mentioned were in before the jury retired to consider of its verdict.

And thereupon the defendant prayed the Court and now prays the Court to sign and seal this her bill of exceptions to have the same force and effect as if each of the said exceptions were severally set forth in a separate bill of exceptions, and the same is accordingly done, and the Court signs and seals this bill of exceptions to have the effect aforesaid now for then this 17 day of June, 1907.

JOB BARNARD, *Justice.* [SEAL.]

15 *Order for Preparation of Record on Appeal.*

Filed July 5, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 48387.

ATKINSON
vs.
SECHRIST.

The Clerk of said Court will please prepare record for Court of Appeals, said record to include J. P. transcript, docket entries, bill of exceptions, judgment entry, notation of appeal, appeal bond.

W. W. BOARMAN AND
HAYDEN JOHNSON,
Attorneys for Defendant.

16 *Docket Entries.*

Supreme Court of the District of Columbia.

No.	Parties.	Action.	Plaintiff's attorney-.
48387	Joseph R. Atkinson, appellant, *v.* Mrs. L. D. Sechrist.	Appeal J. P.	J. Theo. Rupli J. B. Archer Defendant's Attorney-: W. W. Boarman Hayden Johnson

Date.	Proceedings.
1906, M'ch 9.	Deposit toward costs, $10.00 by Rupli.
" " "	Appearance, order; Par. D. Summons & return, Judgment, Notice of Appeal, Bond on appeal with Sam'l W. Pickford, surety & Certificate J. P. filed.
" " "	Summons & copy to appellee issued.
" " 15.	" " " served.
" Nov. 13.	Continued for term (M. 48 p. 162).
1907, May "	Appearance Archer for pl'ff order filed.
" " "	Jury sworn & verdict for pl'ff for $240.00 (M. 48 p. 437).
" " 21.	Judg't on verdict *vs.* def't for $240.00 interest from date & costs (M. 48 p. 449).
" " 21.	Add'l deposit toward cost $ .30 by Atkinson.
" " "	Judg't entered to use of Ada F. Shaw and James B. Archer.
" " 27.	Appearance Boarman & Johnson for Deft. Appeal to Court of Appeals noted, order filed.
" " "	Citation, writ of, issued.

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1907, May 27. Add'l deposit toward cost $5.00 by Boarman.
" " " Citation, writ of, ret'd. Service accepted by J. B. Archer, att'y.
" June 7. Bond on appeal approved & filed.
" " 17. Bill of Exceptions signed and filed (M. 50, p. 2).
" July 5. Order for record filed.

18 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 17 both inclusive, to be a true and correct transcript of the record, according to Directions of Counsel herein filed, a copy of which is made part of this transcript, in cause No. 48387, at Law, wherein Joseph R. Atkinson, is Plaintiff, and Mrs. L. D. Sechrist, is Defendant, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 15th day of July, A. D. 1907.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1810. Mrs. L. D. Sechrist, appellant, *vs.* Joseph R. Atkinson. Court of Appeals, District of Columbia. Filed Jul- 20, 1907. Henry W. Hodges, clerk.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1907.

No. 1810.

L. D. SECHRIST, APPELLANT,

vs.

JOSEPH R. ATKINSON.

BRIEF ON BEHALF OF APPELLANT.

HAYDEN JOHNSON,
W. W. BOARMAN,
Attorneys for Appellant.

LAW REPORTER PRINTING CO., WASHINGTON, D. C.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1907.

No. 1810.

L. D. SECHRIST, APPELLANT,

vs.

JOSEPH R. ATKINSON.

BRIEF ON BEHALF OF APPELLANT.

Statement of Case.

This is on appeal from the judgment of the Supreme Court of the District of Columbia upon the verdict of a jury in favor of the appellee against the appellant for $240, in a suit for the recovery of a real estate broker's commissions. The facts in the case are briefly these: The appellant, Mrs. L. D. Sechrist, was the owner of premises No. 1227 11th street, northwest, in this city. She wished to dispose of the property by sale. On August 30, 1905, she addressed the following letter to the appellee, Joseph R. Atkinson, a real estate broker (Rec., p. 6):

> "JOSEPH R. ATKINSON.
>
> DEAR SIR: Please call as soon as possible to see me regarding some property I have for sale.
>
> Hoping to receive a reply from you soon,
>
> Very resp't,
>
> Mrs. L. D. SECHRIST,
> 1227 11th Street N. W., City."

On the following day Atkinson called upon Mrs. Sechrist in response to this letter. It is claimed by Atkin-

son that on the occasion of that visit Mrs. Sechrist authorized him to offer the property for $6,000, which she would accept for it (Rec., p. 4). It was claimed by Mrs. Sechrist that on that occasion "she fixed no price upon the property, but informed the plaintiff that she would consider offers for the same and let him know later what she would sell the same for" (Rec., p. 6). The broker testified that he "then and there made a memorandum on the back of the letter" before mentioned, which he had brought with him. This memorandum reads, "1227 11 St. N. W.—10 r.—b.—2 story & basement, lot X, frame stable, rent $45, price $7,000, stoves 4, trust $4,000 5 %, Mrs. Lennan north, Mr. Bache south." This memorandum, upon the appellee's testimony above stated, the trial court permitted, over objection and exception of the defendant's counsel, to be read to the jury. *As there was a direct issue of veracity between the plaintiff and* defendant, as to what was said at that interview, the admission of this evidence became important. Atkinson thereupon offered the property to Arthur J. Bache, who signed a contract subject to the approval of the owner to give for it $7,000 (Rec., p. 5). When Mrs. Sechrist was notified of this offer she declined to accept it. Bache then offered $7,500, which the owner also declined to accept. In response to this offer she wrote Atkinson as follows:

"SEPTEMBER 13, 1905.

Mr. ATKINSON.

DEAR SIR: I received your letter yesterday and would like to see you. I called yesterday afternoon, but you were not in.

I have been offered $7,800 spot cash, but I want $8,000 and I think I can get it from the same party.

You can call and see me if you think it necessary. Thanking you very kindly for your trouble.

Mrs. L. D. SECHRIST.

P. S.—I wish to buy another home."

Atkinson could get no higher offer for the property, so he abandoned his negotiations for the sale and returned Bache the $50 deposit the latter had made on his $7,000 offer. *Atkinson said* Mrs. Sechrist told him he must get $8,000 *net* for the property. Atkinson had never told Mrs. Sechrist the name of his proposed purchaser and she did not know he was negotiating with Mr. Bache. She had known Mr. Bache for fourteen years and had sometime before tried to sell him the property. When Atkinson abandoned his efforts to sell the property she placed it in the hands of William W. Boarman, who was also unaware of the previous negotiations between Atkinson and Bache. Bache, hearing later from a different source that the property was in the hands of Boarman, called upon him, and after some hesitation increased his offer to $8,000 and bought the property through him at that price. *Mrs. Sechrist never insisted upon Atkinson getting more than $8,000 for the property* or on his getting for her $8,000 *net.*

Assignments of Error.

The appellant assigns as reversible error the following:

1. That the court below erred in permitting the memorandum on the back of the letter of August 30, 1905, to be read to the jury.

2. The court erred in instructing the jury that "If they believed from the evidence that the defendant had simply authorized the plaintiff to secure a purchaser for the said property without fixing any price thereon and the plaintiff had secured a purchaser for said property at a price which she accepted and sold for, that the defendant had performed his contract and earned his commissions and that the plaintiff had secured a purchaser in the person of Mr. Bache to whom the property was subsequently conveyed."

3. That the court erred in further instructing the jury that "according to the defendant's contention the plaintiff would not be entitled to a verdict unless he had found a purchaser willing to pay $8,000 *net*, for said property."

ARGUMENT.

I.

That the Court Below Erred in Permitting the Memorandum on the Back of the Letter of August 30, 1905, to be Read to the Jury.

This memorandum was made by the plaintiff upon the occasion of his first interview with the defendant. *The whole case hinges upon what was said at that first interview, and this memorandum was offered by the plaintiff and read to the jury in corroboration of his testimony as to what happened.* It will be remembered that the plaintiff said that at this interview the defendant authorized him to secure a purchaser for the property at $6,000. The defendant denied this and insisted that she only requested him to get bids for the property and submit the same to her. That she fixed no price on the property. So this memorandum relates directly to *the one fact in issue* and its importance in the eyes of the jury can be readily seen.

It is submitted that under no rule of evidence could this memorandum have been received in evidence and read to the jury under the circumstances in this case. It would have been permissible to have the plaintiff refresh his memory from the memorandum and then testify of his own knowledge to the facts therein contained (1 Greenleaf on Evidence, 436–437), or it would have been competent had the witness been dead to have the memorandum

properly verified admitted in evidence. But with the witness living and the facts concerning the subject of the memorandum already fresh in his memory, so that it was not even necessary for him to refer to it to refresh his recollection, it is submitted that it was entirely improper and grossly prejudicial to the interests of the defendant to have the memorandum read to the jury. They, no doubt, gave great weight to the fact that the figure of $6,000 was recorded on paper by the plaintiff at the time, and it is highly probable that it had a controlling influence upon their verdict.

The case of Taylor *vs.* Chicago M. & St. P. Ry. Co., 80 Iowa, 431, was reversed by the appellate court for the error of the trial court in permitting a memorandum made under similar circumstances to be read to the jury; that being the only point upon which the case was reversed. The action was for damages against the railway company for the loss of six stacks of hay alleged to have been burned by fire from the defendant's engine. At the trial the defendant produced and had identified a record kept in its roundhouse of the condition of stacks and engines. John Anderson and one Hilman were employed as boiler-washers at that house, one serving in the daytime, and the other at night. It was the duty of the one serving to examine each engine as it came in and to enter on his book the condition of the stack and netting, indicating by "O. K." that it was in good order, and by "B. O." that it was in bad order. It was the duty of the one making the examination and entry to sign his name to the entry. Hilman was not produced or examined. Anderson testified that he was at home, sick. The defendant was permitted, over objection, to introduce and read in evidence the following entries in said book:

> "September 27, number 213 B. O. . . . November 5, number 213 O. K. C. HILMAN."

The court in its opinion says:

> "It does not appear from the transcript by whom the entry of September was made. That of November 5 was shown to be in Hilman's handwriting. These entries are simply private memoranda, such as may be used to refresh recollection. *We are not aware of any rule that renders such memoranda admissible in evidence* (1 Greenl. Ev., secs. 436, 437). That the entry of November 5 was in Hilman's handwriting did not render it competent evidence. In Hoffman *vs.* Railway Co., 40 Minn., 60; 41 N. W. Rep., 301, wherein the same kind of entry was offered, it was held incompetent and inadmissible. Appellee contended that if the fire was set out by one of its engines it was number 213, and as there was evidence tending to so show, the condition of 213 became an inquiry of importance. These entries relate directly to that subject. That Hilman was at home sick might have been good cause for continuance, *but certainly did lay the foundation for admitting a memorandum made by him as evidence of an important fact.* We are of the opinion that appellant's objection to these entries should have been sustained, and admitting them in evidence was prejudicial error. As for this reason the judgment of the district court must be reversed; we do not notice the other errors assigned and argued, as they will not arise upon a retrial."

See, also, Stephen's Digest of the Law of Evidence, 2d Edition, 343.

II.

The court erred in instructing the jury that—

> "if they believed from the evidence that the defendant had simply authorized the plaintiff to secure a purchaser for the said property without fixing any price thereon and the plaintiff had secured a purchaser for said property at a price which she accepted and sold

> for, that the defendant had performed his contract and earned his commissions and that the plaintiff had secured a purchaser in the person of Mr. Bache to whom the property was subsequently conveyed."

The entire case hinges upon the conversation between the plaintiff and the defendant at the latter's residence when the former called in response to her letter of August 30, 1905. The plaintiff contended that the defendant authorized him to offer her property for sale at $6,000. It was on this claim that he filed his suit. The defendant claimed that she merely requested the plaintiff to receive offers for the property and submit them to her. It is not contended by either that the defendant employed the plaintiff to secure her a purchaser for the property for which services she either agreed, or the law implied an agreement, upon her part, to pay. If the jury believed the plaintiff's testimony on this point, their verdict must have been for him. If they believed the defendants, the verdict must have been for her. For the court to instruct them—

> "if they believed from the evidence that the defendant had simply authorized the plaintiff to secure a purchaser for said property, without fixing any price thereon, and the plaintiff had secured a purchaser for said property at a price which she accepted and sold for, that the plaintiff had performed his contract and earned his commissions,"

amounts to no more than an invitation to the jury to find a verdict for the plaintiff upon a theory entirely unwarranted by any interpretation of the evidence. The plaintiff did not find a purchaser for said property *at a price which she accepted and sold for*, and the plaintiff never claimed that he had found a purchaser for such property at a price which she accepted and sold for. The plaintiff found a purchaser for said property at the price of

$7,500; but he testified that he could get him no higher. The property was sold to Mr. Bache at the price of $8,000, which the plaintiff could not get him to give. The concluding sentence on that point, "and that the plaintiff had secured a purchaser in the person of Mr. Bache, to whom the property was subsequently conveyed," suggests that the subsequent conveyance to Mr. Bache amounted to a performance by the plaintiff of his contract. It is submitted that this portion of the charge is entirely unwarranted by the evidence; that it was greatly misleading to the jury, and that it could not but have been prejudicial to the interests of the defendant to have it given to the jury.

III.

The court erred in further instructing the jury that—

> "according to the defendant's contention the plaintiff would not be entitled to a verdict unless he had found a purchaser willing to pay $8,000 NET for said property."

The *plaintiff's* testimony in the case was that the defendant wished $8,000 net for her property. The *defendant's* testimony was that she simply wished $8,000 for her property and that she sold it for $8,000. Upon this evidence for the court to instruct the jury that, according to the *defendant's* contention, the plaintiff would not be entitled to a verdict unless he had gotten her $8,000 *net* for the property, does not correctly state to the jury the defendant's contention and certainly places her in an unreasonable and not to say ridiculous position in the eyes of the jury. The defendant's testimony was that she had never authorized plaintiff to sell her property for less than $8,000. That she subsequently accepted $8,000 for it. For the court upon this testimony to

practically ridicule it by telling the jury that she insisted on $8,000 *net* for it, is, it is submitted, error.

It is respectfully submitted that two-thirds of the court's charge to the jury which was very brief, is erroneous in the respects indicated and that it would have been almost impossible for the jury according to said charge to have found a verdict for any other than the plaintiff.

Respectfully submitted.

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